From: Short Circuit by IJ
To: Alan Xenos
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SHORT CIRCUIT NEWSLETTER & PODCAST

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Friends, the Short Circuit team has a new podcast, Unpublished Opinions, where we go beyond the federal courts of appeals to see what's on the legal minds of IJ attorneys. In this first episode, Patrick Jaicomo airs some grievances about how (actual) unpublished opinions are treated, and Anya Bidwell muses on SCOTUS oral arguments.

- As part of Special Counsel Jack Smith's investigation into the January 6, 2021 riot at the U.S. Capitol, the government sought a search warrant in January 2023 that directed Twitter to produce records related to the @realDonaldTrump Twitter account. Along with the warrant, the feds also issued a nondisclosure order prohibiting Twitter from disclosing the existence of the search warrant for 180 days. Twitter refused to comply with the search warrant until it had litigated its First Amendment challenge to the nondisclosure order. After Twitter lost that challenge and was three days late producing the requested documents, the district court fined the company $350k for contempt. D.C. Circuit: Affirmed in all respects, particularly in light of [redacted].

- As the First Circuit details, and as the president and fellows of Harvard College have by now surely taken to heart, it is vitally important to promptly notify your insurance carrier of any potential claims.

- Connecticut, like most other states, had a religious exemption from its mandatory vaccination law. Facing declining vaccination rates, the legislature repealed the exemption. OK under the Free Exercise Clause? District court: Case dismissed. Second Circuit: It's within the religion clauses' "play in the

joints." A statutory claim is undismissed, though. Dissent: Free exercise should go forward. There's some hazy underinclusiveness.

- Goodhart's Law states, "When a measure becomes a target, it ceases to be a good measure," a phenomenon partly explained by people cheating to hit their target. Witness, for example, the former Dean of the Fox School of Business at Temple University, who falsified data to boost the school's online MBA ranking to #1 in U.S. News and World Report. Third Circuit: And his conviction for wire fraud is affirmed.

- Under federal law, a "prevailing party" in a civil rights case can obtain attorneys' fees. The Supreme Court has said that to prevail, a plaintiff needs a "judicially sanctioned change" in the parties' legal relationship. But does that include preliminary injunctions? Almost every other circuit has said "yes," but the Fourth Circuit has said "no." Until now! Fourth Circuit (en banc): A PI can be enough if it materially alters things; otherwise, the gov't could game the system. Dissent: "Prevailing" means "prevailing." (IJ filed an amicus brief urging this result.)

- In a South Carolina prison unit for prisoners with serious mental illness, two convicted double-murderers with histories of severe prison violence are given special privileges and allowed to move freely about. They brutally murder four other prisoners, which is undetected for hours—despite a guard making five perfunctory rounds—until they report themselves. Fourth Circuit: Qualified immunity. "[A]trocities occur in prison without the prison bearing responsibility." Dissent: The majority opinion is "a blueprint for how prison officials can avoid liability."

- After prosecutors tell St. Tammany Parish, La. officers that it would be unconstitutional to arrest a former colleague who criticized a detective's handling of a murder case, they arrest him anyway. District court: Could be unconstitutional retaliation for his protected speech. IJ amicus brief: Everyone in America enjoys the right to call Detective Daniel Buckner "totally clueless." Fifth Circuit (unpublished): Denial of qualified immunity affirmed.

- Man is pulled over for driving without a license plate. Officers, one of whom is DEA, find guns and marihuana cigarette butts. He's sentenced to nearly four years in prison (and three years of supervised release) for being an "unlawful user" of a controlled substance while possessing a gun. Fifth Circuit: Conviction reversed. The gov't didn't show he was high at the time he was stopped. "[O]ur history and tradition may support some limits on an intoxicated person's right to carry a weapon, but it does not justify disarming a sober citizen based exclusively on his past drug usage."

- That loud noise you just heard was a sonic boom caused by this 2-1 ruling from the Fifth Circuit—holding that Mississippi's felon-disenfranchisement law violates the Eighth Amendment's prohibition on cruel and unusual punishment —shattering the sound barrier on its way to en banc rehearing.

- As telecom providers seek to expand 5G service, they need new infrastructure —something most municipalities allow via hefty fees. But some municipalities take a different tack. Pasadena, Tex. imposes aesthetic standards with minimum-spacing requirements between poles, which essentially make it impossible for the providers to actually build out the infrastructure. Fifth Circuit: The Federal Telecommunications Act preempts such chicanery. (And a pro tip: defendants should file an answer if they want to raise an affirmative defense.)

- Jackson, Miss. police want to talk to man who's near a crime scene, but he flees. An officer shoots him. (He lives.) Man: I was unarmed and running away! Officers: He turned around and pointed a gun at us! District court: Well, you shot him in the back and he doesn't have a gun in the surveillance video, so … no qualified immunity. Fifth Circuit (unpublished): Reversed. Plaintiff fails to point to a case that clearly establishes officers can't shoot people in these circumstances (or argue that it's so obvious every officer would know).

- You might need a cup of joe to stay awake through this ho-hum Sixth Circuit opinion applying settled circuit law to uphold an injunction against Starbucks, which must reinstate fired employees while the NLRB considers the union's allegations of unfair labor practices. But Judge Readler must have had a quadruple shot of espresso in his morning macchiato! His concurrence is a strong brew, blasting the circuit's long history of applying a "feeble test" that "stacks the deck in the Board's favor," rather than the traditional equitable test that applies to just about every other type of injunction.

- Within seconds of opening a couple's front door, Gurnee, Ill. police officer shoots, kills their dog. Officer: The dog was barking and growling. Couple: The dog was being friendly. Seventh Circuit: The officer's body cam shows an "inkblot of a blur" and lacks audio. This goes to a jury. Reversed.

- In a series of events that can only be termed "unfortunate," an Illinois inmate being processed for release to a halfway house is ordered to sign an "Electronic Detention Program Agreement" before trotting out the door. Man: But you've given me only the signature page of the agreement, and the top of the page says it "appl[ies] only to sex offender[s]," which I decidedly am not. What gives? Clinical services supervisor: Sign it! Man: But … why? Clinical services supervisor: Sign it! Man: No! Anyway, long story short, they issue him a disciplinary ticket and he's kept in custody for another year and a half. Seventh Circuit (over a dissent): The man's refusal to sign the agreement (which, it turns out, would have been binding on him whether he signed it or not) was protected speech, so his First Amendment retaliation claim against the supervisor can go to trial.

- Minnesota couple is prescribed hydroxychloroquine and ivermectin for COVID-19, but pharmacists at Walmart and Hy-Vee refuse to fill the prescriptions. Can the couple sue the pharmacies under the common law "right of self-determination"? Does it make a difference if they have "not defined the elements of a claim in tort *that has not been recognized anywhere*"? The Eighth Circuit has the answer.

- Tou Thao is one of four now-former Minneapolis police officers involved in killing George Floyd. Thao suggested that they bind Floyd's feet to his waist instead of kneeling on his neck, told EMS to arrive more quickly than another officer previously requested, and held back bystanders calling on officers to get off Floyd. He's convicted of failing to intervene in Chauvin's use of unreasonable force and of failing to give Floyd medical aid. Eighth Circuit: The evidence was "not overwhelming," but a reasonable jury could still find him guilty. Conviction affirmed.

- Former reality TV personality Josh Duggar used his work computer to download hundreds of child-pornography images. When federal agents arrived to execute a search warrant, they walked straight up to Duggar, who pulled out a cell phone and said he wanted to call his attorney. Instead, agents seized the phone as evidence. He then made a series of incriminating

statements. Eighth Circuit: And it was totally fine to use those statements against him despite the fact that he wasn't Mirandized. Conviction affirmed.

- James Huntsman, son of Utah billionaire Jon Huntsman Sr., tithed more than $2.6 mil to the LDS Church between 2003 and 2015. When he learned in 2019 that the church had been using tithe funds for commercial projects instead of purely charitable purposes, he asked for the money back and was rebuffed. He sued, and the district court granted summary judgment to the church. Ninth Circuit: Reversed. These secular fraud claims don't implicate the ecclesiastical abstention doctrine, and there's enough here to go to trial.

- Plaintiffs owned butterfly knives before they moved to Hawaiʻi but have to give them up because the state makes their possession a misdemeanor. They'd like to own one of these knives—also known as "balisongs"—again and file a Second Amendment lawsuit. Ninth Circuit: At the Founding "arms" included "fascines, halberds, javelins, pikes, and swords" so the Second Amendment sure-as-Sherlock applies to butterfly knives. This law is unconstitutional.

- Allegation: Early in the COVID-19 pandemic, California officials moved inmates from a prison suffering a major outbreak to another prison with zero COVID, taking barely any precautions. The new prison suffered an outbreak, killing a guard and 25 prisoners. Ninth Circuit: No qualified immunity because that's clearly a state-created danger and thus a due process violation. Dissent: Everything about COVID then was novel and uncertain, so nothing was clearly established about the gov't's legal duties.

- Detainee at Polk County, Fla. jail sues officials for, among other things, scanning his legal mail into a computer system. Eleventh Circuit: The First Amendment requires opening legal mail in the detainee's presence and checking only for contraband. That doesn't include scanning it and saving it on a computer that jail officials can access. Case undismissed!

- Pop quiz, hotshot: If a district court adds extra words to your agreed injunction, do you (a) ask the district court to reconsider, (b) file an appeal, or (c) ignore the plain language of the injunction for a while, then start obeying the injunction as written, then try to go back to ignoring it again before finally (seventeen years after the injunction was entered) asking the district court to delete the extra phrase as a "clerical error"? Those of you flirting with option (c) may wish to uncork a bottle of out-of-state wine and consider this Eleventh Circuit opinion as a cautionary tale.

- And in amicus brief news, IJ is urging the Second Circuit to hold that qualified immunity does not apply to claims brought under the Religious Freedom Restoration Act and thus does not shield these FBI agents—who put plaintiffs on the No Fly List in retaliation for their refusal to become informants—from suit.

Primly submitted, the SC staff

Altimont Wilks has turned his life around since his release from prison, and he's now the proprietor of not one but two friendly neighborhood corner stores in Maryland, one in Frederick and one in Hagerstown. But! Relying on a strained, unreasoned, and downright capricious reading of USDA regulations, the feds have now barred Wilks

from accepting SNAP benefits at his stores. So this month, he and IJ filed suit to force the USDA to stop badgering people who have paid their debt to society and are trying to earn an honest living. Click here to learn more.

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